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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NAUTILUS INSURANCE COMPANY, Plaintiff and Appellant, v. MONIQUE MINGIONE, Defendant and Respondent.	G055914 (Super. Ct. No. 30-2013-00691814) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thierry Patrick Colaw, Judge. Affirmed.

Selman Breitman, Alan B. Yuter and Rachel E. Hobbs for Plaintiff and Appellant.

Lakeshore Law Center and Jeffrey N. Wilens for Defendant and Respondent.

* * *

Plaintiff and appellant Nautilus Insurance Company (Nautilus) appeals from a judgment in which the court found coverage under certain insurance policies it issued to its insured for claims made by defendant and respondent Monique Mingione (Mingione). In a class action, Mingione alleged the insured, not a party to this appeal, violated Penal Code section 632 (all further statutory references are to the Penal Code unless otherwise stated) by improperly recording a private interview without her knowledge and publishing it to third parties, both simultaneously and later. She sued for damages under section 637.2.

Nautilus contends the alleged wrongful acts were excluded from coverage under the criminal acts exclusion; section 637.2 provides only for recovery of penalties and not damages and thus the amounts were not covered; and the violation of privacy by the insured did not constitute a publication under the policy and thus was not covered.

We disagree with all of these assertions and affirm the judgment.

FACTS AND PROCEDURAL HISTORY

In 2012 Mingione filed the first amended complaint (FAC) in a class action against Events and Adventures California, Inc. and two other defendants (collectively Events) for violation of section 632, for invasion of privacy, and negligence, titled *Mingione v. Events and Adventures California, Inc.* (Super. Ct. Orange County, No. 30-2102-00547490) (underlying action).

Events is a "membership club designed to help singles meet while experiencing adventures." The application form potential members were required to complete stated: "I agree and understand that in order to maintain club standards, this club does screen via an interview process and is selective to whom club membership is offered. I also understand that details regarding membership fees and the club are not discussed until it has been determined that I in fact do qualify for membership. . . . Any information on this questionnaire is confidential and is used and kept by [Events] only." Above the signature line the following appeared: "I acknowledge that interviews are

sometimes subject to monitoring to ensure customer service and the accuracy of our representatives' statements."

After Mingione signed the questionnaire she participated in an interview with an Events employee. It was conducted in a private room with the door closed. It was not possible for someone near the room to hear the conversation, and there were no visible recording devices in the room. Mingione did not agree to have her conversation recorded or have a third party listen in and reasonably believed it was private. After Mingione declined to join Events, the interviewer called her later that evening and mentioned he had watched her video. When Mingione asked what he meant, the interviewer explained the interview had been recorded. An Events representative told Mingione the questionnaire had disclosed interviews could be recorded and explained only the audio portion was recorded.

The FAC alleged the recording of the interview violated section 632.[1] It further alleged that pursuant to section 637.2 a party may bring a civil cause of action for violation of section 632 and recover the greater of $5,000 or treble the amount of actual damages, if any. Additionally, the FAC pleaded section 637.2, subdivision (c) provided a party could recover even without suffering or being threatened with actual damages. Mingione and the class members sought $5,000 each.

Nautilus had issued two essentially identical commercial general liability (CGL) policies (collectively Policy) to Events covering the period January 2011 to January 2013. It provided coverage for damages resulting from personal and advertising

[1] Section 632, subdivision (a) states: "A person who, intentionally and without the consent of all parties to a confidential communication, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication, whether the communication is carried on among the parties in the presence of one another . . . shall be punished by a fine not exceeding . . . ($2,500) per violation, or imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment."

injuries, including "[o]ral or written publication, in any manner, of material that violates a person's right of privacy." The Policy excluded "'[p]ersonal and advertising injury' arising out of a criminal act committed by or at the direction of the insured."

Nautilus defended the underlying action under a reservation of rights. It also filed this declaratory relief action against Mingione and Events seeking a declaration it did not owe any coverage because the FAC in the underlying action did not allege property damage or bodily injury or any of the enumerated advertising injuries. It also alleged there was no coverage because the underlying action alleged criminal conduct and sought penalties under section 632.

Nautilus, Mingione, and Events settled the underlying action (Settlement Agreement) and judgment was entered. Events specifically denied any wrongdoing, including denying it had illegally recorded any interviews. In addition, Events maintained it had "substantial defenses." The Settlement Agreement specifically provided it was not an admission of liability by Events. The order approving the settlement, which also served as the judgment, contained the same term.

Mingione agreed not to execute on any Events assets except the Policy. Nautilus agreed to pay $1 million into a common fund and litigate five enumerated coverage issues with Mingione in the declaratory relief action. If Mingione prevailed on all five issues, Nautilus would pay the proceeds of the fund. The five issues were: 1) Whether the $5,000 or treble actual damages provided for under section 637.2, subdivision (a)(1) and (2) were excluded from coverage under the Policy; 2) whether the claims under section 632 fall within the criminal acts exclusion in the Policy; 3) whether the amounts sought did not constitute damages as provided in the Policy; 4) whether the viewing of the recordings by Events personnel did not constitute a publication as provided in the Policy; and 5) whether the prior publication exclusion applied.[2]

[2] The last issue is not the subject of this appeal. We do not include the findings in the tentative decision and statement of decision on this issue.

According to the Settlement Agreement, Mingione had the burden to show her claims fell "within the insuring grant or to prove waiver." Nautilus had the burden to prove one of the exclusions in the Policy applied.

The parties stipulated to the facts, including Event's conduct in recording the interviews and the relevant provisions of the Policy. This included the fact the recordings "were distributed internally to and viewed by other company officers and employees (who were not present at the interviews), or to an by their counsel, either in real time or in subsequent viewings, but were not distributed to or viewed by the general public." There was no stipulation as to whether Events violated a criminal law. The parties also stipulated that had the underlying action gone to trial Mingione and the class would have sought the greater of three times actual damages or $5,000 per recording provided by section 637.2, subdivision (a)(1) and (2). The parties further stipulated to evidence, including the Policy, declarations and depositions of some of the class members, and the Settlement Agreement in the underlying action.

After a bench trial the court issued a tentative decision, finding in favor of Mingione on all five issues. As to the first issue, i.e., whether the $5,000 minimum damages or treble damages were excluded under the Policy, the court disagreed with Nautilus's argument the amounts were "purely penal" (underscoring omitted) and not compensatory. The court found Nautilus's interpretation was inconsistent with the plain language of the statute and particularly the use of the word damages in section 637.2. The court further noted section 637.2 did not contain the term "penalty." Further, section 637.2, subdivision (a) requires there be injury as a condition to an award of compensation. "This implies harm for which the law in California compensates with money damages."

The court also ruled the claims in the underlying action were civil and not excluded by the Policy's criminal acts exclusion. Although section 632 is a criminal statute, no criminal charges were filed, the underlying action did not seek relief under that

section, there was no finding of liability or guilt against Events, nor did the parties stipulate to an offense under section 632. The court pointed out there were no California cases supporting Nautilus's argument and the out-of-state cases were inapt.

The court also found the amounts sought by Mingione in the underlying action were damages or harm as described in the Policy. "Damages" as used in insurance policies must be given its ordinary meaning. A reasonable insured would understand the language in the Policy to cover the claims made under section 637.2. The court observed no case had held amounts award under section 637.2 were not damages for purposes of insurance coverage.

The tentative decision further found, based on the stipulated facts, that for purposes of the Policy, there was publication when the interview was distributed internally at Events and viewed. It referred to Nautilus's contention to the contrary as "puzzling and unmeritorious." The court explained there needed to be "publication of some material," "in any manner," in violation of the right of privacy. (Italics omitted.) It found the interview occurred and was published when other persons, not present, listened to it. It further found Nautilus did "not dispute that the recording violated the right of privacy."

When Mingione filed a proposed statement of decision essentially identical to the tentative ruling, Nautilus objected. Subsequently the court signed the proposed statement of decision (Statement of Decision).

DISCUSSION

1. Standard of Review and Principles of Insurance Policy Interpretation

Where the facts are undisputed and the issue turns on interpretation of an insurance policy, we employ a de novo standard of review. (*Powerine Oil Co. Inc. v. Superior Court* (2005) 37 Cal.4th 377, 390-391.) Interpretation of statutes requires the same standard. (*California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1041.)

Insurance policies are construed according to the principles of contract interpretation. (*State of California v. Continental Ins. Co*. (2012) 55 Cal.4th 186, 194 (*Continental*).) Our goal is to give effect to the parties' mutual intention, determining it solely from the policy's provisions if possible. (*Id*. at p. 195.) We interpret the provisions in their "'"'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage.'"'" (*Ibid*.) When the language of the policy is clear, it controls. (*Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1074-1075.)

"'A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable.'" (*Continental, supra*, 55 Cal.4th at p. 195.) We do not find ambiguity in the abstract but must construe the policy's language in the context of the document as a whole according to the particular circumstances. (*Ibid*.) Lack of a definition of a term does not automatically create ambiguity but absence of a definition, "though perhaps not dispositive, might weigh, even strongly, in favor of finding an ambiguity." (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 867.) An ambiguous provision "must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." (Civ. Code, § 1649; *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822.) If that rule does not resolve the ambiguity, the policy "should be interpreted most strongly against the party who caused the uncertainty to exist," i.e., the insurer. (Civ. Code, § 1654; *Continental*, at p. 195.)

"'An insurance policy's coverage provisions must be interpreted broadly to afford the insured the greatest possible protection, while a policy's exclusions must be interpreted narrowly against the insurer. [Citation.] The exclusionary clause must be "'conspicuous, plain and clear.'" [Citation.] "This rule applies with particular force when the coverage portion of the insurance policy would lead an insured to reasonably expect coverage for the claim purportedly excluded." [Citation.]' [Citation.]" (*Energy*

Ins. Mutual Limited v. Ace American Ins. Co. (2017) 14 Cal.App.5th 281, 291 (*Ace American*).)

"'[I]nsurance contracts, as contracts of adhesion, are subject to careful judicial scrutiny to avoid injury to the public. [Citation.] Courts considering adhesion contracts have a heightened responsibility to prevent the marketing of policies that provide unrealistic and inadequate coverage. Thus, any portion of an insurance contract which is violative of public policy is not enforceable.' [Citation.]" (*California Fair Plan Assn. v. Garnes* (2017) 11 Cal.App.5th 1276, 1305, fn. omitted (*Garnes*).)

2. Criminal Acts Exclusion

Relying on section 637.2, Nautilus contends Mingione's claims (Claims) were not covered because they fell within the criminal acts exclusion of the Policy. The exclusion provides there is no coverage for "'[p]ersonal and advertising injury' arising out of a criminal act committed by or at the direction of the insured.'" None of the arguments Nautilus advances to support this theory persuades.

First, there was never any finding of criminal conduct. In the underlying action, Events denied any wrongdoing and the case was settled without any admission or finding of wrongdoing by Events. In fact, the Settlement Agreement and judgment specifically stated Events denied all liability and provided the settlement was not an admission of liability. Nor were any criminal charges ever filed so there was no guilty verdict. Further, in the underlying action, Mingione did not seek relief based on section 632.

Rather, Nautilus chose to settle the underlying action without any finding of criminal conduct. It did not have to do so. It could have defended that action, with the possibility of a jury verdict Events had committed a criminal act. Instead, Nautilus agreed to try the case based on stipulated facts, which did not include a stipulation of misconduct or criminal conduct. Without criminal conduct, the exclusion cannot apply.

At oral argument, Nautilus cited Mingione's declaration, which was admitted at the trial of this action, and pointed to her statements regarding the taping of her interview. It argued this was unrebutted evidence a crime was committed. But this evidence was not relevant to the issues before the trial court in this action.

Nautilus incorrectly claims Mingione is arguing there must be a conviction for the exclusion to apply and no conviction is required. But Mingione makes no such argument, instead contending Nautilus had to prove criminal conduct. Further, the authority Nautilus cites is inapplicable. *20th Century Ins. Co. v. Schurtz* (2001) 92 Cal.App.4th 1188, 1196 (*Schurtz*) held the criminal acts exclusion applied regardless of the insured's intent or knowledge the act constitutes a crime. But neither knowledge nor intent are at issue here. In addition, the insured there was convicted of a crime. (*Ibid*.)

Nautilus cites no California cases in support.[3] The three federal cases on which it relies are inapt. *Allstate Ins. Co v. Talbot* (N.D.Cal. 1988) 690 F.Supp. 886, 889 is comparable to *Schurtz*, noting the intent of the insured was not determinative. Also, again, the insured had been convicted of a crime. (*Ibid*.) In *Allstate Ins. Co. v. Miller* (D. Haw. 2010) 732 F.Supp.2d 1128, in applying Hawaiian Law, the court held the exclusion applied because a duty to defend was based solely on what was alleged in the complaint. (*Id*. at p. 1141.) Nautilus failed to explain why we should adopt this reasoning and we know of no reason to do so.

Finally, in *Allstate Ins. Co. v. Cutcher* (N.D.Ohio 1996) 920 F.Supp. 796, the court found the criminal acts exclusion in the policy applied. But the policy itself

[3] Nautilus relies heavily on out of state and federal cases to support many of its arguments throughout the briefs and fails to acknowledge they are not binding on us. (*Haynes v. EMC Mortgage Corp*. (2012) 205 Cal.App.4th 329, 335; *US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 905.) It also fails to explain why the cases should apply. Federal cases are only persuasive authority at best (*People v. Memro* (1995) 11 Cal.4th 786, 882), so we must be persuaded as to why they should guide us.

provided the exclusion applied whether or not the insured was charged with or convicted of a crime. The Policy here contains no such language.

Generally, in California cases holding the criminal acts exclusion applied, the insured was convicted of or pleaded guilty to a crime. (E.g., *Century-National Ins. Co. v. Glenn* (2001) 86 Cal.App.4th 1392, 1397 [exclusion applied where insured pleaded guilty to committing felony]; *20th Century Ins. Co. v. Stewart* (1998) 63 Cal.App.4th 1333, 1338 [same].)

And we find persuasive two California federal district court cases on this point. In *LensCrafters, Inc. v. Liberty Mutual Fire Ins. Co*. (N.D.Cal., Jan. 20, 2005, No. C 04-1001 SBA) 2005 WL 146896 the court stated the defendant had "failed to provide any authority to suggest that the criminal act exclusion applies where an insured is alleged to have violated a statute that provides for both civil and criminal penalties, but where the insured has not been charged with any criminal violation." (*Id*. at p. *13, fn. omitted.) We reject Nautilus's attempt to distinguish this case on the ground the statute did not "categorically deem" its violation was a crime. (*Ibid*.)

Likewise, *Netscape Communications Corp. v. Federal Ins. Co.* (N.D.Cal., Oct. 10, 2007, No. C 06-00198 JW) 2007 WL 2972924, stated: "The mere allegation that Plaintiffs broke a criminal law in the Underlying Actions is not enough to support the assertion that Plaintiffs knowingly broke or consented to the breaking of a criminal law. This is especially true because the Underlying Actions were civil in nature and settled without a court finding on liability, or for that matter, guilt." (*Id*. at p. *6.) Nautilus's attempt to distinguish this case on the ground it dealt with a different criminal acts exclusion fails. The point is the underlying action was civil and there was no finding of guilt or even liability by the insured. Our facts are parallel.

As an additional ground to support its argument a conviction is not required for the exclusion to apply, Nautilus asserts a violation of section 632 is "a crime" and a person can recover under section 637.2 only for violating section 632. Section 637.2,

subdivision (a) provides "Any person who has been injured by a violation of this chapter may bring an action against the person who committed the violation" to recover $5,000 per violation or treble actual damages, if any.

Nautilus claims the court erred when it found section 632 was not at issue. Nautilus points to the FAC in the underlying action, which alleged Events had violated section 632 and that it was a criminal violation to record the interview. Nautilus then notes section 632, subdivision (a) provides for "punishment" by way of a fine or imprisonment or both.

Nautilus is wrong. What the court actually stated was Mingione did not seek relief under section 632. Mingione sought damages under section 637.2, alleging that statute provided for a civil cause of action for violation of section 632.

Moreover, even had Mingione alleged a crime, that would not be sufficient. Nautilus could not rely on an allegation; proof was required. And there was none here.

Nautilus stresses the term "arising out of" a criminal act is to be broadly construed. It cites *Davis v. Farmers Ins. Group* (2005) 134 Cal.App.4th 100, 107 and *Aloha Pacific, Inc. v. California Ins. Guarantee Assn*. (2000) 79 Cal.App.4th 297, 318-319 for the proposition the exclusion bars coverage even if the claimed injuries have only a only "'minimal causal connection'" to a criminal act. But for this to apply, the excluded acts must constitute an actual crime, something Nautilus failed to establish here.

Making a collateral argument, Nautilus maintains the criminal acts exclusion has been applied to other privacy violations under the Penal Code, citing one California federal district court case and two out-of-state cases. None persuades.

In *North Atlantic Casualty & Surety Ins. Co. v. William D.* (N.D.Cal. 1990) 743 F.Supp. 1361 (*William D.*) the defendant insured pleaded nolo contendere to a charge of violating section 653n for installing a two-way mirror in a restroom. When employees sued the defendant, the plaintiff insurer defended under a reservation of rights but refused to indemnify for the settlement payment. In its declaratory relief action the plaintiff

prevailed on its argument the claim was excluded by virtue of the criminal acts exclusion in the policy. (*Id*. at p. 1366.) Nautilus argues this supports its claim a conviction was unnecessary.

Not so. The court in *William D*. specifically found and relied on "independent evidence" of the crime by virtue of the defendant's admission of the wrongful conduct in a deposition. (*William D., supra*, 743 F.Supp. at p. 1366.) As we have noted, there was no admission of any criminal conduct; in fact Events denied any wrongdoing.

In *Gillund v. Meridian Mutual Ins. Co*. (Wis.Ct.App. 2009) 323 Wis.2d 1, which does not bind us, the court stated the insurance policies at issue did not require prosecution or conviction and upheld the exclusion without either occurring. (*Id*. at p. 17.) However, again, there the insured admitted he violated the statute. (*Id*. at p. 18.)

Nautilus also cites *Hastings Mutual Ins. Co. v. LeGrow* (Mich.Ct.App. 2003) 2003 WL 21508761, claiming the court applied the criminal acts exclusion to the insured's videotaping women without their knowledge without reference to criminal prosecution or conviction. We do not find any value in this nonbinding and unpublished case, based on different policy language and Michigan law, as to why it should govern our decision.

Likewise, we are not persuaded by non-California cases cited by Nautilus in support of its claim courts have applied a criminal acts exclusion to acts violating wiretapping and eavesdropping statutes allegedly similar to section 632. Nautilus does not adequately describe the cases, including the relevant statutes and policy provisions, or provide sufficient legal argument to show why these should guide us in resolving the question before us.

Nautilus also briefly claims the exclusion applies whether the action is criminal or civil. But it cites only *Rose Acre Farms, Inc. v. Columbia Casualty Co*. (7th Cir. 2011) 662 F.3d 765, 769, and fails to offer any argument as to why this case applies

or should apply. It does not cite any California case holding that the mere claim by an insurer that the act in question may be a crime is sufficient to trigger the criminal act exclusion. This claim is forfeited for failure to provide reasoned legal argument. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 (*Benach*).)

Nor does Nautilus's conclusory statement that "permitting recovery of civil penalties for criminal conduct would undermine the purpose of CGL coverage" have merit. The only authority cited is a footnote from an insurance treatise and Nautilus provides no legal analysis in support of the claim. This argument is likewise forfeited. (*Benach, supra*, 149 Cal.App.4th at p. 852.)

We agree with Mingione that public policy and the rules of insurance policy interpretation dictate against application of the criminal acts exclusion. Insurance policy exclusions must be narrowly constructed against the insurer, especially when, based on the coverage section of the policy, an insured would reasonably expect to be covered for the claim at issue. (*Ace American, supra*, 14 Cal.App.5th at p. 291.) Further, we interpret insurance policies with an eye toward avoiding harm to the public. (*Garnes, supra*, 11 Cal.App.5th at p. 1305.)

Here, the Policy covered advertising injury, defined as including various torts, some of which could also be classified as criminal conduct, such as false arrest or imprisonment (§§ 236, 237), infringement of copyright (18 U.S. Code, § 2319), or invasion of privacy (§ 632).

The taping of the interview and real time and subsequent viewing by Events' personnel not conducting the interview fall within that definition of advertising injury under the Policy, i.e., "oral or written publication, in any manner, of material that violates a person's right of privacy." Events would reasonably expect to be covered for claims alleging these torts, even if they are also potentially crimes. If excluded, coverage under the Policy would be illusory.

3. Damages Under Section 637.2

Section 637.2, subdivision (a) provides, "Any person who has been injured by a violation of this chapter may bring an action against the person who committed the violation" to recover $5,000 per violation or three times the amount of actual damages, if any. Section 637.2, subdivision (b) provides for injunctive relief and allows a party to "seek damages." Section 637.2, subdivision (c) states a party seeking to recover need not show he or she has incurred or been threatened with actual damages.

The parties disagree whether section 637.2 provides for the recovery of damages. Nautilus argues the statute is purely punitive and provides only for penalties, which are not covered by the Policy. Mingione counters that the amounts recoverable under the section are insurable damages under the Policy. To resolve this dispute we must interpret section 637.2.

Our fundamental responsibility is to """determine the Legislature's intent so as to effectuate the law's purpose."""" (*Canales v. Wells Fargo Bank, N.A.* (2018) 23 Cal.App.5th 1262, 1269.) In doing so we look at the language of the statute, """giving it a plain and commonsense meaning."""" (*Ibid*.) We do not isolate individual words or phrases, but analyze the statute in its entirety, harmonizing various parts. (*Ibid*.)

Based on this initial analysis, more than one reasonable interpretation of the statute is possible. Thus, we look to extrinsic aids, including legislative history, other rules of construction, and public policy. (*Ailanto Properties, Inc. v. City of Half Moon Bay* (2006) 142 Cal.App.4th 572, 582-583.) After further interpretation, we conclude section 637.2 provides for damages, which are covered under the Policy.

Importantly, the statute plainly authorized recovery of damages. (§ 637.2, subd. (b) [An injured party may "seek damages"].) Damages are not defined in the Policy. Thus, "we look to its 'ordinary and popular' definition. """[D]amages" describes a payment made to compensate a party for injuries suffered."' (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1268; Civ. Code, § 3281 ["Every person who

suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages"].)

Contrary to Nautilus's argument, section 637.2, subdivision (a) requires a party be "injured" to be compensated. Nautilus relies on subdivision (c), which provides a party seeking recovery need not show actual damages, claiming this shows it was in the nature of a penalty. Read in isolation, this is not an entirely unreasonable interpretation. But we must construe this subdivision in the context of the entire statute, and when the section is read as a whole (*MCI Communication Services, Inc. v. California Dept. of Tax & Fee Administration* (2018) 28 Cal.App.5th 635, 643 [we construe statute as a whole]), this interpretation does not stand up.

Section 637.2 requires proof of injury, just not proof of actual damages. The lack of a requirement of proof of actual damages does not transform the recovery into a penalty. Moreover, the statute anticipates a party may choose to prove actual damages by allowing recovery of treble actual damages. And there was evidence the plaintiffs in the underlying action suffered at least emotional distress.

Nautilus argues courts "routinely" refer to amounts recoverable under section 637.2 as "penalties." (E.g., *Rubin v. Green* (1993) 4 Cal.4th 1187, 1196.) But the statute never uses the term penalty; rather it provides for recovery of damages. And none of these cases construed the section to mean damages were not recoverable. If anything, the courts may have been using "penalty" as a generic or shorthand term but its use plainly was not in the context of determining whether harm prohibited by the section was compensable in damages covered by insurance.

Nautilus asserts the Legislature's intent in enacting section 637.2 was to punish, making recovery thereunder a penalty. But Nautilus does not direct us to any legislative history. The one case cited, *Friddle v. Epstein* (1993) 16 Cal.App.4th 1649, does not support the claim. It does state the Legislature intended to punish violations of the Privacy Act. But it never addresses the issue before us or states amounts recoverable

are only punitive. Further, the statute itself shows the Legislature intended parties injured by a violation be compensated in damages.

Nautilus relies on cases holding the one-year statute of limitations on actions for a statute providing for a penalty applies to section 637.2. (E.g., *Montalti v. Catanzariti* (1987) 191 Cal.App.3d 96, 98 [§ 637.2 is, therefore, a provision for a penalty].) But again, these cases do not address the question of whether an award of damages under that section is covered by insurance. Cases are not authority for propositions not considered. (*Riske v. Superior Court* (2018) 22 Cal.App.5th 295, 308.)

Citing only one unpublished federal district court case, Nautilus asserts California courts have found statutory damages can be penalties and thus not assignable. Again, this case did not discuss insurance coverage.

Nautilus's contention when a statute is a penalty for one purpose, i.e., the statute of limitations, it is an uninsurable penalty in an insurance context is without merit. Its only authority, *Ace American Ins. Co. v. Dish Network, LLC* (10th Cir. 2018) 883 F.3d 881, is wholly inapt. It held statutory damages under the federal Telephone Consumer Protection Act (47 U.S.C. § 227; TCPA) are penal according to Colorado law and thus not insurable as a matter of Colorado public policy. (883 F.3d. at p. 892.) But this case did not deal California law or public policy much less the same statute. And Nautilus has not explained its assertion there is "no compelling reason" our courts would not conclude

that because section 637.2 is a penalty statute for statute of limitations purposes, it would also be considered as providing for a penalty for insurance coverage.[4]

Nautilus asserts the fact section 637.2 provides for treble damages makes the recovery a penalty, citing *Menefee v. Ostawari* (1991) 228 Cal.App.3d 239. But *Menefee* did not address the issue we are deciding. Rather, it stated: "Claims based upon statutes which provide for mandatory recovery of damages additional to actual losses incurred, such as treble damages, are considered penal in nature, and thus are governed by the one-year limitations period under section 340, subdivision (1)." (*Id*. at p. 243.) This does not support Nautilus's argument but actually undermines it. *Menefee* concedes in its holding that penal statutes falling within the one-year statute of limitations can also provide for the recovery of damages.

Further, treble damages are not always punitive. In *PacifiCare Health Systems, Inc. v. Book* (2003) 538 U.S. 401, 405-406, while acknowledging that some treble damages are punitive, the court held sometimes treble damages are remedial, e.g., under the Clayton Act (15 U.S.C. § 12 et seq.) and the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1961 et seq.). Our review of section 637.2 leads us to conclude damages thereunder are remedial as well.

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[4] Courts in other jurisdictions have held to the contrary, i.e., amounts recoverable under the TCPA are not penalties but are damages. (E.g., *Penzer v. Transportation Ins. Co.* (11th Cir. 2008) 545 F.3d 1303, 1311 [damages under TCPA are not punitive]; *Motorists Mutual Ins. Co. v. Dandy-Jim, Inc.* (Ohio App. 2009) 912 N.E.2d 659, 668 [same]; *Universal Underwriters Ins. Co. v. Lou Fusz Automobile Network, Inc*. (8th Cir. 2005) 401 F.3d 876, 881 ["Whether we view the fixed award as a liquidate sum for actual harm or an incentive for aggrieved parties to act as private attorneys general, or both, it is clear that the fixed amount serves more than purely punitive or deterrent goals"].) Also, cases have held actual damages recoverable under the Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.), of not less than $100 or $1,000 (15 U.S.C. § 1681n(a)(1)(A) & (a)(1)(B) & (b)) are not solely punitive but are also compensatory. (E.g., *Bateman v. American Multi-Cinema, Inc*. (9th Cir. 2010) 623 F.3d 708, 718.)

The statute provides damages only to parties who have been injured. Thus, it is reasonable to conclude the damages provided are remedial. Because the amount of actual damages for this type of injury is likely to be small, treble damages makes the remedy meaningful. And because the invasion of privacy injury for which section 637.2 compensates can be difficult to quantify, the statute also provides the $5,000 alternative recovery, to fully and properly compensate the injured party.

Likewise we are not persuaded by the claim damages under section 637.2 are "duplicative" of punitive damages. This has no bearing on the question before us. We also reject Nautilus's contention public policy prohibits shifting of penalties to insurers, because damages under section 637.2 are not penalties.

Both the language of section 637.2 and principles of insurance policy interpretation lead to the conclusion the amounts sought by Mingione are damages covered by the Policy and not uninsurable penalties. Nautilus has not adequately explained why the recoverable amounts provided for by section 637.2 should be treated as penalties and therefore not covered by the Policy. Rather, Nautilus has relied on a strained interpretation of the words in the statute in violation of principles of statutory construction.

4. Publication

The Policy provides coverage for injury arising out of "oral or written publication, in an manner, of material that violates a person's right to privacy." The parties stipulated the issue was "whether the internal distribution and viewing of the recordings by other company personnel and their agents do not constitute a 'publication' within the meaning of the" Policy. The stipulated facts, that the interviews were recorded and viewed in both real time and subsequently by Events' employees, show publication. Nautilus does not dispute that these acts occurred or that Mingione's privacy rights were violated. Instead, it sets up false premises and relies on faulty logic to conclude there was no publication as per the Policy. But its efforts fail.

Nautilus sets out the various types of invasion of privacy, one of which is intrusionary privacy. (*Shulman v. Group W Productions, Inc*. (1998) 18 Cal.4th 200, 214, fn. 4.) It claims this tort is based on a physical intrusion and does not require publication. There are several problems with this claim.

First, the Policy does not limit coverage to a specific type of invasion of privacy or those that require publication. Instead, it provides coverage when there has been publication that violates the right to privacy. Second, the fact publication is not a required element of the tort of intrusionary invasion of privacy does not negate the fact publication did occur. And it makes no sense to find that mere improper recording under section 632 is unlawful, warranting damages under section 637.2, but damages would not be available if the recording was also published. We will not give credence to such an absurd result.

State Farm General Ins. Co. v. JT's Frames, Inc. (2010) 181 Cal.App.4th 429, cited by Nautilus, does not change the result. Again, Nautilus relies on the case's distinction of types of privacy violations, but as stated, that is irrelevant under the Policy. Further, the court held fax blasts in violation of the TCPA were not covered by the advertising injury provision of an insurance policy. But with fax blasts, there is no publication to third parties, contrary to the facts in our case.

Further, section 632 prohibits eavesdropping. (§ 632, subd. (a).) Broadcasting the interview in real time, as occurred here, was both eavesdropping and publication. The Policy covered injury for publication "in any manner." The transmission of the interview falls within the scope of that language.

We are not persuaded by cases Nautilus cites for the proposition section 632 does not require publication, and publication has no relevance to the statute. Nautilus points to *Kimmel v. Goland* (1990) 51 Cal.3d 202, where the court held the

litigation privilege in Civil Code section 47, subdivision (b)[5] could not be asserted as a defense to a violation of section 637.2 because the plaintiffs were suing only for injuries from unlawful recording, not publication. (*Kimmel*, at pp. 211-212.) But here Mingione sued not only for recording but for eavesdropping by virtue of another person listening in on the interview. Further, *Kimmel* did not state that recording a conversation in violation of section 632 became lawful or precluded damages if the recording was also published.

Nautilus also relies on *Kight v. CashCall, Inc.* (2011) 200 Cal.App.4th 1377 and *Lieberman v. KCOP Television, Inc*. (2003) 110 Cal.App.4th 156 for the proposition that "section 632 does not prohibit the disclosure of information gathered in violation of its terms." (*Lieberman*, at p. 167.) It highlights language in *Kight* that the violation of section 632 is the secret recording, whether or not the recording is later disseminated to a third party. (*Kight*, at p. 1390.) But here there was a surreptitious recording and real time transmission to third parties in addition to the later transmission. Here, the publication occurred simultaneously with the recording.

Likewise, the federal district court case Nautilus cites as the only authority for its proposition secretly taping a telephone call is not a publication is distinguishable. In *Duff Supply Co. v. Crum & Forster Ins. Co*. (E.D.Pa. 1997, No. CIV. A. 96-8481) 1997 WL 255483 the court held the policy covered injury for a privacy violation only when there was publication. (*Id*. at p. *9.) But, contrary to our facts, there the alleged wrongful act was an employer listening in on an employee's phone calls. And, although there was evidence the information obtained from the calls was later given to third parties, the insurer never had that evidence when it denied coverage. (*Id*. at p. *8.) Again, not the same as the facts in our case where Nautilus knew there was publication.

We are similarly not persuaded by Nautilus's reliance on *National Union Fire Ins. Co. of Pittsburgh, PA v. Coinstar, Inc*. (W.D.Wash. 2014) 39 F.Supp.3d 1149

[5] Civil Code section 47, subdivision (b) provides that a publication or broadcast in a legislative, judicial, or other official proceeding is privileged.

(*Coinstar*), which applied Washington state insurance law to an alleged violation of Civil Code section 1747.08, subdivision (a),[6] part of the California Song-Beverly Credit Card Act (Civ. Code, § 1747 et seq.). The court held the insurance policy, which contained language identical to that at issue here, did not provide coverage because recording a credit card number was not publication under the policy. (*Coinstar*, at p. 1158.)

Coinstar is inapt. It deals with a different statute, which does not prohibit eavesdropping as does section 632. Additionally, damages are not recoverable under Civil Code section 1747.08, only penalties, so a violation would not be covered by insurance.

Finally, we reject Nautilus's argument the trial court erred by misquoting the Policy. In interpreting the Policy the court stated a there had to be a "'publication of some material' [clearly there was pursuant to the stipulation], the publication can be 'in any manner' [very broad language construed against the drafting party . . .], and there must be a violation of the victim's right of privacy." Nautilus challenges this construction, arguing that a publication and a separate privacy violation are not required. Frankly, this is the height of hair-splitting, which has no impact on our decision.

[6] This section prohibits a business accepting credit cards from requesting from or requiring a customer to provide personal identification information.

DISPOSITION

The judgment is affirmed. Mingione is entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

ARONSON, ACTING P. J.

GOETHALS, J.